

MEMORANDUM

Engineering Division



To: Charles Lawson, Acting City Manager
From: Greg Armendariz, Acting Assistant City Engineer
By: Darryl Wong, Utility Engineer
Subject: Proposed Urban Runoff Permit Changes and Potential Impacts
Date: January 11, 2005

BACKGROUND: An Urban Runoff Discharge permit was reissued on February 21, 2001 and amended on October 17, 2001, by the San Francisco Regional Water Quality Control Board. The permit requires pollutant treatment facilities to be constructed before urban runoff may be discharged to creeks (referred to sometimes as permit section C.3 requirements). Treatment facilities may include infiltration systems such as swales, detention ponds, and regionally located detention and infiltration ponds.

C.3 provisions apply to both private projects (such as Barry Swensen) and public projects (such as the Sports Complex) that have new or redevelopment impervious areas of 1 acre or more. Private projects that are deemed complete after the start date of October 15, 2003 are required to comply with the requirements. Public projects approved for design funding after October 15, 2003 are also required to comply. Beginning April 15, 2005, projects that have impervious areas of 10,000 square feet or more (called Group 2 projects) will be affected. These new requirements result in resource and cost impacts to the developer, user and city:

- The developer is required to design and install on-site treatment facilities, or contribute to an equivalent mitigation fund for a regional treatment facility. The developer is required to submit a stormwater control plan as part of the City planning approval phase since commitments on land use for treatment facilities must be identified.
- The user is liable for providing all treatment operation and maintenance, maintaining records, and paying the associated costs.
- City staff time commitments are needed to provide oversight on the proper design, installation, operation, inspection and enforcement activities of the treatment facilities, and to annually report the treatment facility status to the Regional Water Quality Control Board. The Planning and Engineering

Divisions are most affected with Public Works Department, Building Division and Fire Inspection also being impacted.

To assist the implementation, Milpitas developed a C.3 Guidebook that was published in September 24, 2003. The document provides step-by-step guidance to developers and staff on meeting treatment requirements.

Permit Appeal and Litigation Status. The Cities of Milpitas and San Jose have appealed the C.3 section of the permit. The City of Milpitas submitted the appeal to the State Water Resources Control Board on November 16, 2001. Milpitas seeks to modify the permit to 1) revise the definitions in the permit to exempt affordable housing projects and projects consistent with the Transit Village Development Act of 1994; 2) revise the permit to limit its requirements to projects that measurably increase stormwater runoff through an increase in impervious surface; (3) to limit the costs of implementation of treatment facilities to 1% of project construction costs; and to exempt small dischargers, such as the City of Milpitas, from the definition of Group 2 projects. The State Board concluded that the appeal did not raise issues of statewide concern, and denied the appeal without a hearing on that basis. Thereafter, Milpitas and San Jose filed a legal challenge in Santa Clara Superior Court. The Cities jointly decided to not serve the complaint on the State Board in order to determine how the Regional Board was going to interpret the permit, and how it would react to the cities' implementation efforts. The option remains open to serve the complaint, and proceed with the litigation if the cities deem it appropriate.

Waiver Program: A waiver from C.3 requirements is allowed under the permit for those projects meeting certain criteria. These include facilities located within a redevelopment area such as midtown. The Milpitas waiver program may be found in Appendix A. To date, two proposed private projects are proceeding in compliance with C.3 requirements, and there are no proposed projects with waiver requests.

PROPOSED NEW PERMIT AMENDMENT: At a November 17, 2004, RWQCB session, board staff was specifically critical of Milpitas for not requiring a project (KB Residential Development) to comply with C3 provisions. Milpitas responded with written and oral testimony that the project was deemed complete consistent with the permit provisions prior to the October 15, 2003 trigger date, and therefore does not fall under the new requirements. Milpitas is also proceeding in good faith having developed and applied, among other things, a Milpitas-specific Developer Guidebook for C3 compliance as mentioned above.

As a result of the session, the RWQCB directed their staff to work cooperatively with the co-permittees to validate compliance and to reach agreement on any permit amendments, if needed. One session was conducted on December 14, 2004 with further sessions

anticipated. However, on December 23, 2004 RWQCB staff circulated a proposed Permit Amendment with a tentative hearing to adopt the amendment on February 14, 2005.

Although some of the changes formalize understandings on revised implementation dates made to make the Santa Clara permit more consistent with permits issued to Alameda, Contra Costa and San Mateo Counties, key changes include requiring board approval prior to implementing any waiver program, and limiting exceptions to the C.3 requirements only after demonstration of undue burden to the project. **The potential impact would be greatest on Milpitas Redevelopment projects [such as Mid-Penninsula, and Senior Housing], which may be required to meet more stringent treatment requirements at potentially significant additional costs.**

NEXT STEPS: We will continue to work with the RWQCB staff to cooperatively achieve compliance in lieu of additional permit revisions. We would oppose any permit revision not in the interest of Milpitas at the proposed amendment hearing. The Cities of San Jose and Sunnyvale are also actively opposing any changes.

Please don't hesitate to contact Greg Armendariz or me with any comments or questions.

cc: Patrick Whitnell, Assistant City Attorney
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Utility Engineering: 70.12.4.0.4

CITY OF MILPITAS STORMWATER C.3 COMPLIANCE WAIVER PROGRAM

In accordance with Provision C.3.g of Order No. 01-119 of the California Regional Water Quality Control Board-San Francisco Bay Region, and Chapter 7 of the City of Milpitas Stormwater C.3. Guidebook, the City of Milpitas establishes the following program to permit a development project applicant to request a waiver from the requirement to install permanent stormwater pollutant treatment measures for its project or to be allowed to provide alternative compliance. Other NPDES permit requirements, including site design to minimize imperviousness and structural source control BMPs, may still apply. The City finds that the categories of projects eligible for a waiver or alternative compliance is appropriate because the City does not expect these projects to negatively affect water quality or water run-off volume differently from pre-project conditions. The City has determined that these projects will be infill or redevelopment projects on sites that were previously developed or located within a catchment that is already largely paved. Further these projects have the potential to reduce water quality impacts or provide other desirable environmental benefits.

1. **ELIGIBILITY.** An applicant is eligible for a waiver from the requirement to install onsite permanent stormwater pollutant treatment measures or comply with the requirements of any applicable Hydromodification Plan (C.3.f and C.3.g) if the project is a smart growth project. An applicant is eligible to provide alternative compliance if providing onsite treatment measures is impractical or infeasible.
2. **REQUEST FOR WAIVER OR ALTERNATIVE COMPLIANCE.** The applicant must submit a written application that sets forth with specificity the project's eligibility for a waiver or alternative compliance under the Program's criteria. The application must be submitted as part of the project stormwater control plan, and, at a minimum, must contain the following information:
 - a. Name and location of the project,
 - b. Project description (narrative including information on project type-restaurant, shopping center, etc),
 - c. Total final design project area and percentage of imperviousness,
 - d. If applying for a waiver, an explanation of the project's eligibility for a waiver
 - e. If applying for alternative compliance, the amount of stormwater treatment to be provided by onsite treatment and by alternative compliance, and the type, nature, size, and location of the alternative compliance and the stormwater treatment project receiving the benefit
 - e. Date of anticipated project completion
3. **WAIVER.** The City will grant a project a waiver from compliance with sections C.3(f) and C.3(g) if the project is a smart growth project. A smart growth project is a project that falls within one or more of the following categories:

- a. Project located within one-half mile of an existing or planned rail, light rail, or bus stations (not including simple bus stops that are not stations), terminal, project-dedicated van or bus shuttle service station, or major transfer point, or a planned BART, heavy rail, or intermodal station.
 - b. Projects within the boundaries of a Milpitas Redevelopment Agency project area.
 - c. Affordable and senior housing projects that meet the criteria of Government Code 65915(b).
 - d. Projects that are proposed for properties that are abandoned, idled or underused, industrial or commercial facilities where expansion or redevelopment is complicated by real or perceived contamination. These properties are commonly referred to as "brownfields."
4. **ALTERNATIVE COMPLIANCE.** If the applicant can demonstrate that onsite treatment measures would be impractical or infeasible for a project, the City will deem that the project has complied with sections C.3(f) and C.3.(g) if the applicant provides alternative compliance. If a project applicant chooses to provide alternative compliance by participating in a regional stormwater treatment facility that discharges into the same receiving waters as the project site, the City will allow the applicant to provide offsite treatment measures without the need for the applicant to demonstrate impracticability or infeasibility.
- a. **Eligibility for Alternative Compliance:**
 - i. **Impractical or Infeasible.** Project compliance is impractical or infeasible where the applicant can demonstrate that one of the following applies to the project:
 - 1. **Cost Constraints.** The cost of installing treatment measures on the project site would be in excess of 2% of the project costs.
 - 2. **Physical Constraints.** (a) The project site's size or configuration makes impossible the use of detention, conveyance of runoff, or other engineered systems, and the project site's soil is not suitable for infiltration; or (b) the project site is located within a groundwater protection zone.
 - 3. **Legal Constraints.** Installing treatment measures would result in the project being unable to comply with other federal, state or local regulatory requirements applicable to the project.
 - b. **Methods of Alternative Compliance.** If the City determines the applicant is eligible for alternative compliance, the applicant may provide alternative compliance by one of the following ways, subject to the prior written approval by the City of Milpitas:
 - i. **Regional Stormwater Treatment Facility.** The project applicant may financially contribute to, or construct in whole or in part, a regional stormwater treatment facility to which the project

stormwater discharges, and that results in the enhancement of water quality or beneficial use.

- ii. Treatment Trade. The project applicant may financially contribute to stormwater treatment measures on another site that is within the South San Francisco Bay Drainage Basin.
- c. Level and Cost of Alternative Compliance. Alternative compliance must result in additional stormwater treatment to the maximum extent practicable (1) that is equal to, or exceeds, the difference between pre-project and anticipated post-project runoff pollutant loading; (2) that treats an equivalent pollutant load; or (3) that provides other equivalent water quality benefits. The City may not require the applicant to provide alternative compliance, whether through a financial contribution or by providing equivalent treatment or benefits, if the cost will exceed 2% of the project's cost. If the applicant elects to make a financial contribution, the contribution must be made prior to issuance of the building permit for the project.

5. DEFINITIONS.

- a. Project Cost. Project cost is all costs of construction and materials for the physical improvements. It does not include the cost of land acquisition, financing, permitting, demolition, design, or off-site mitigation measures.
- b. Regional Stormwater Treatment Facility. "Regional Stormwater Treatment Facility" includes regional or municipal stormwater detention or treatment facilities; in-stream or out of stream structures to increase the threshold flow in the stream; or structures that have been approved by any applicable Hydromodification Management Plan, or other facility as approved by the City of Milpitas.

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